

**AL HIBAH: THE PRINCIPLES AND OPERATIONAL MECHANISM
IN THE
CONTEMPORARY MALAYSIAN REALITY**

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To my family, Zareha, Mazran, Filzah, Fadzilah, Farhanah, Firdaus

ABSTRACT

This thesis deals with the solution of problems of property disposition, without ruling out the commonly used land transfer under *faraid* and *wassiah*, through a method called *hibah*. The suitability of *wassiah* order to provide adequate method to current property management is limited. This is due to the nature of *wassiah* in Islam that only allows the maximum of one third of the property to be distributed to the beneficiaries upon the death of the proprietor. No such limitation exist in *hibah*, because in this case the owner divests himself of all rights in the property immediately, *Faraid* and *wassiah* are largely related to the distribution of property after death of the owner. As not to compromise or contravene with the rules of Islamic law of succession and bequest, many Muslims are reluctant to use *hibah* as an alternative. This is due to the fact that *wassiah* and *faraid* are seen to be the only tool available to them and also due to the lack of knowledge and the very fact of the existence of *hibah* does not cross the mind of many Muslims in the country. In this respect, *hibah* is seen as the best solution of the above proposal since the property can be transferred to family members with terms and conditions merely decided by the donor himself, and, of course with the agreement of the other heirs or would be beneficiaries. This thesis also emphasizes that this method of property disposition should be made understood by all in the first place. Without that, heirs and would be beneficiaries would consider this method of disposition as unfair and injustice to them. Materials contained in this thesis were obtained from books, such as religious books, books on Islamic land law, papers from the internet, seminars and lectures. The findings obtained from this research indicates that the use of this instrument of property disposal is not yet popular among the Muslims of this country, as many still opted for other traditional methods

ABSTRAK

Tesis ini membicarakan penyelesaian kepada masalah yang berkaitan dengan perlupusan harta dikalangan orang Islam tanpa mengeneipkan cara perlupusan melalui faraid dan wasiat. Kesesuaian cara wasiat adalah terhad, kerana hanya maksima sepertiga sahaja dari bahagian harta itu mampu dipindahmilik melalui cara ini. Tiada had perlupusan dalam hibah kerana pemberi hibah memutuskan terus haknya dari harta itu setelah melakukan hibah itu, maka dengan itu hibah didapati sebagai instrumen yang sangat sesuai. Wasiat dan faraid hanya boleh berlaku apabila tuan punya harta sudah meninggal dunia, manakala hibah dilakukan semasa hayat. Pada masa sekarang orang Islam menyangkakan bahawa cara wasiat dan faraid sahaja cara terbaik. Oleh yang demikian cara hibah kurang mendapat perhatian. Selain itu didalam hal pelupusan harta, hibah didapati cara yang sangat baik kerana pemberi harta mampu memindahmilik harta dengan terma and syarat yang diputuskannya sendiri, setelah dipersetujui oleh waris waris dan bakal penerima hak yang lain. Walau bagaimana pun tesis ini mencadangkan bahawa segala tata cara perlupusan harta melalui hibah ini harus difahami terlebih dahulu, tanpanya ianya mungkin akan dilihat sebagai tidak adil. Maklumat yang terkandung dalam tesis ini diambil dari buku, termasuk buku berkaitan undang undang tanah Islam, buku agama dan dari kertas internet, seminar dan kuliah. Penemuan yang diperolehi menandakan penggunaan kaedah hibah ini dalam pembahagian harta adalah sangat kurang berbanding dengan cara perlupusan yang lain.

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CHAPTER I

INTRODUCTION

1.1 Background

Management of property disposition in Malaysia is different from other countries due to different religious background, custom and the way of life of the people. Because of that there exist numerous government and non government agencies which have jurisdiction in the disposal of properties in the country. Among them are the High Court, Jabatan Ketua Pengarah Tanah dan Galian Malaysia, Amanah Raya Berhad, and heads of departments who are equipped with the powers of disposal of land under different Acts, government orders and government administrative circulars.

Property management, which is personal in nature such as *hibah* and bequest, is thought not being as important as commercial property management in the real meaning of business. An average Muslim may own some properties such as a house, several pieces of land, shares, savings and goods such as vehicles or machinery. Even with that little properties they have, Muslims are not so particular or do not take seriously the management of their properties while they are alive. Knowing that after their death, their heirs and beneficiaries will be taken care of, as there is existing system of law such as *faraid* that will take care with the property disposition of the deceased. With the increasing emergence of well-off and rich Muslims in Malaysia as the result of economic prosperity, family property management related to the

above is becoming important and should be taken seriously by the Muslims in Malaysia.

Under Islamic law an owner of a property has extensive powers of disposition of his properties. He can choose to dispose the ownership of his property by whatever methods allowable by the authorities while he is alive or to leave to the authorities to dispose whatever properties to his heirs and beneficiaries after his death. He has the right of choosing whatever option available for the sake of his family. All these options can be executed by himself or through the then available organizations or corporations in a State, which deals with property disposition of the Muslims.

Hibah can be in the form of goods, services or any valuable property. It may be movable property such as machinery, gold and vehicle or immovable property such as land, houses and buildings. Other than the above, other properties such as crops, animals, miscellaneous wealth such as life insurance policy, company shares, unit trust, and employees' provident fund are capable of being *hibah*.

Immovable properties such as houses, buildings and land, while movable properties such as machineries, vehicles, business shares etc all fall in the category of valuable properties. While properties such as fruits, trees, animals etc all fall into the category of goods that are also capable of being an item for *hibah*. This includes negotiable instruments, proprietary rights, land under attachment and the right of redemption.

One of the commonest problems in this concept is the lack of understanding of *hibah* itself among the Muslim community in the country. Muslims in the street generally had not heard of the term *hibah*, even though many had heard the word gift but they do not know the concept had a far wider meaning than the word gift itself. It had only concentrated among the Muslim scholars and academicians. Most *ulamaks* and religious personnel who know this concept do not look at the importance and the impact that this concept has towards the Muslims.

This narrow interpretation was caused by lack of awareness, lack of guidelines by the relevant authorities and also lack of suitable and useable

instruments of doing it. The relevant authorities share some of the weakness by their lack of support and cooperation in the practice of *hibah*. There had been no enactment or provisions in the existing laws of property distribution about *hibah*, as though this concept had not been in existence at all.

The concept and meaning of *hibah* is very wide. Most of us had in the past practiced *hibah* in one way or another without even knowing it. The understanding of the concept through the reinterpretation of the Holy Quran and the Sunnah and employing *ijtihad* in the application of *hibah* must be fully understood. Muslim in Malaysia should be broad based and the provision of the accepted school of *fiqh* be taken into consideration for the purpose of the reinstatement and codification of the Muslim Law. *Hibah* is not yet well rooted in the property disposition system in the country, but it has some potential to be one. Little efforts are being made for *hibah* to become a truly viable alternative property disposition system. But, with the support of the government and the relevant authorities, it is being hoped that it shall one day be an important tool in the field of property disposition.

Initial skepticism about this system and its inherent ability to meet the demands of the modern day property industry is hoped to be lessened and finally disappeared. It is also hoped that there is growing understanding and appreciation about *hibah*. With the passage of time and the experience over the years in seeing the practical implementation and the working of the system, the way forward shall become more clearly defined. The areas where new laws have to be enacted, existing laws revised and consequently amendments made to other applicable laws and procedures have come into focus.

What need to be done is the refinement and putting into place the necessary legal infrastructure, both the substantive laws and procedures. The urgency for this to be done is keenly felt by the Islamic property industry and the Muslims at large together with the practitioners (*hibah* consultants), bankers, lawyers, land administrators, academicians, the Islamic theologies and the people alike. It is again hoped that the relevant authorities will take the necessary actions urgently.

1.2 Statement of Problems

Muslims in the country own properties in the form of land scattered in all corners of the country. Problems of disposition of properties occur when an owner dies as there are numerous heirs and beneficiaries who claim the property of the deceased. This problem would lead to neglect of the property and as a result failure to develop these properties can cause the heirs and beneficiaries any benefits from the properties themselves. The nation would lose in term of agricultural products that could be cultivated in these fertile lands due to failure of proper property disposition among the heirs. Whereas in other cases where disposition had been successfully settled among the heirs, the fractional division had caused more serious problem due to the size of each division as being too small to be economically developed.

So there is a need to find the most suitable solution for this problem of property disposition among Muslims. Innovation and creativity are acceptable in Islam as long the basic principle of the Quran and *Sunnah* are being maintained. This means that Muslim can adopt whatever form of doing business transaction while maintaining the rules of the Quran and the *Sunnah*.. In this context, whatever conventional instruments of dealing were not against the views of Islam and the principles of the *syariah* were adopted, while those, which were against, were left out or being modified and adjusted so as to agree with the *syariah* principles.

1.3 Aim

The aim of the thesis is to investigate the principles of *hibah* and the way it can be implemented in Malaysia. At the same time it is also for the purpose of identifying

The present practice by the private and public sector in the country focusing on the problems and solutions in its implementations, and comparing its practice with other types of property disposals, searching for the most effective method for the benefits of property owners.

1.4 Research Objectives

The main objective of this thesis is to introduce this uncommonly used method of *hibah* in the property disposition of the Muslim in this country. With this, the writer hopes that future property disposals do not only utilize the commonly used method of *faraid* and *wassiah* only. There would be various types of *hibah* being introduced in this paper, thus property owners can choose the method most suitable to them, and let themselves witness the transaction of their properties to their children or whoever they wish to while they are alive.

The application of *hibah* in Malaysia especially in the banking and financial sector and also the Islamic insurance of *takaful* are also covered in this thesis. The mechanism of how these instruments of property disposition in these institutions are carried out becomes one of the objectives of this thesis.

1.5 Research Scope

Scope of research is based on secondary information obtained from Muslim Religious books, journals and other written materials compiled from seminars and lectures. This thesis also investigates the materials from earlier writers and how their views and recommendations could be applied to our present situations in the country.

1.6 Research Importance

The research is hoped to contribute to the State Religious Department, The Land Office, Financial Institutions and institutions that deal with property businesses. This will also create awareness among the Muslims in the country that their properties could be distributed to any parties they want while they are alive. This will create a more dynamic method of property disposal which could be more profitable to the owners and at the same time reducing the presently huge arrears in

property transactions at the various governmental or private institutions which takes many years to clear as is happening at the moment.

1.7 Research Methodology

Research was done through readings of various books, not only those connected directly with the subject matter but also those that deals with banking, finances, land rules and various Islamic Religious books. Any article that deals with “gifts” was felt to have connections with this subject. It was later found out that there were numerous act of giving in the field of Islamic banking and Islamic insurance, and these being the core subject of this research.

1.8 Chapter Flow

Writing started with the concept of property in Islam, that how Muslims are allowed to properties and at the same time be able to disposed off their properties to others by whatever method of disposition they choose. Later on the subject moved to *hibah*, that is the various types of *hibah* and their conditions. Realizing that *hibah* had been practiced in Malaysia by banks and financial institutions, the writing covers some aspects of this institutions and their role in applying this concept.

Realizing that any new concept has its problems and restrictions, the research moved to find out these and how to solve them and give some recommendations.

Chapter 1 deals with the various methods of property disposal among the Muslim property owners in the country. They are free to dispose off their properties by which ever methods they wished, whether while they are alive or after their demised. This chapter also explains how the writing of this thesis is done, starting with the general objectives, the problems and the solution of the subject matter.

Chapter 2 deals with the general discussions about property acquisition as well as the sources of Islamic laws governing of land and property. Beginning with the supreme source of the Holy Quran and goes further to the *sunnah* and finally the subsidiary sources of Islamic laws such as *al-ijma*, *al-qiyas*, *istihsan* and so on.

Chapter 3 deals with the concept of *hibah*, which is the core subject that is being discussed in this thesis. It explains the meaning of *hibah*, its various ingredients which include all the types of *hibah* and also how such *hibah* can be revoked.

Chapter 4 deals with the application of *hibah* in Malaysia especially by the financial institutions and insurance companies which apply *hibah* instruments in their business dealings

Chapter 5 deals with the problems and solutions of applying *hibah* instruments in the country especially focusing the willingness of the individual property owners and the authorities in applying this method of property disposal, not putting aside the traditional methods of disposal by sale and purchase as well as the traditional and commonly methods of the *faraid*.

Chapter 6 deals with the general conclusions and the findings of this thesis